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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-797

THE MIAMI HERALD PUBLISHING COMPANY, A DIVISION OF KNIGHT NEWSPAPERS, INC., *Appellant*,

v.

PAT L. TORNILLO, JR., *Appellee*.

On Appeal from the Supreme Court of Florida

BRIEF OF AMICI CURIAE, THE AMERICAN SOCIETY OF NEWSPAPER EDITORS AND THE SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI IN SUPPORT OF APPELLANT

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February 28, 1974

THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

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The American Society of Newspaper Editors and the Society of Professional Journalists, Sigma Delta Chi, submit this brief as amici curiae in support of Appellant's Appeal from the Judgment of the Florida Supreme Court entered on October 10, 1973, which held that Section 104.38 of the Florida Statues does not violate the First Amendment of the United States Constitution. Written consents of all parties to the filing of this brief have been given pursuant to Supreme Court Rule 42(1), and are annexed hereto.

STATEMENT OF THE CASE

Amici curiae adopt Appellant's statement of the case.

QUESTIONS PRESENTED FOR REVIEW

1. Does the First Amendment of the United States Constitution permit a state to impose direct controls upon a newspaper's editorial judgment by the enactment of a statute which requires, under pain of criminal sanction, a newspaper to publish a reply as a condition to publishing material critical of political candidates?

INTEREST OF AMICI CURIAE

The American Society of Newspaper Editors is a nationwide, professional organization of more than 800 persons holding positions as directing editors of daily newspapers throughout the United States. The purposes of the Society, which was founded more than 50 years ago, include the maintenance of "the dignity and rights of the profession" (ASNE Constitution, preamble), and the ongoing responsibility to improve the manner in which the journalism profession carries out its responsibilities in providing an unfettered and effective press in the service of the American people.

The Society of Professional Journalists, Sigma Delta Chi, is the society of students and practitioners of journalism. With more than 100 student chapters and more than 100 professional chapters, its 21,000 members include the most distinguished journalists in the United States.

In their professional capacity, members of ASNE and The Society of Professional Journalists, Sigma Delta Chi, are seriously concerned that the Florida Supreme Court's decision, if upheld, will have a stifling and suppressive effect on news reporting in American newspapers.

ARGUMENT

The constitutional vice of the Florida compulsory publication statute is that it, for the first time, permits a governmental entity to impose direct controls upon a newspaper's editorial content and judgment. At the heart of editorial policy making and journalistic integrity is the decision of what is and what is not to be published. As this Court recently emphasized: "For better or for worse, editing is what editors are for; and editing is selection and choice of material."[1] The Florida compulsory reply statute directly and nakedly deprives newspapers and editors of editorial freedom of choice, and substitutes therefor the administrative fiat of the government as censor.[2]

Significantly, the targets of the governmental controls imposed by Florida upon editorial freedom and judgment are stories, commentary and criticisms of the operation of government itself, and criticism of candidates for public office. This is the area in which governmental intervention is most dangerous and can be least tolerated. Whatever else the First Amendment may have been intended to do, it was most assuredly designed to protect, and indeed to further, the unfettered performance by the press of its vital constitutional role as a critic of governmental affairs and the process of government itself:

> "The predominant purpose of the . . . [First Amendment] was to preserve an un-

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[1] *Columbia Broadcasting System, Inc. v. Democratic National Committee*, ____ U.S. ____; 36 L.Ed.2d 772 (1973).

[2] *Columbia Broadcasting System, Inc., supra*, 36 L.Ed. at 811-11 (concurring opinion of Justice Douglas).

> trammeled press as a vital source of public information. The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppresion or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern. *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1935).

The concept that governmental regulation of the Press will enhance First Amendment values is illusory and erroneous. Every court which has considered the matter (other than the Florida State Supreme Court in its decision here at issue) has properly and decisively rejected the theory that the First Amendment condones or allows government to place itself in a position as an arbiter of what should or should not be printed. See, *e.g.*, *Chicago Joint Board, Amal. Clothing Workers v. Chicago Tribune*, 435 F.2d 470 (7th Cir. 1970) cert. den. 402 U.S. 973 (1971). *Avins v. Rutgers, State University of New Jersey*, 385 F.2d 151 (3d Cir. 1967), *Brown v. Murphy*, 355 F.Supp. 416 (SDNY 1973); *Yablonski v. UMW*, 305 F.Supp. 868 (D.D.C. 1969).

It is ironic that the Florida compulsory reply statute was upheld by the Florida Supreme Court on the ground that the intent behind it was to increase public discussion and debate, when the statute may well have precisely the opposite effect. The extent to which the statute, if upheld, will allow governmental regulation of the formulation of editorial policy, and curtial criticsm by newspapers of

candidates for public office, cannot be minimized. Enforcement of the statute will create the following paradoxical dilemma: either newspapers will cease acting as critics of candidates for public office, or, if they continue to do so, will inevitably bring governmental dictat into the editorial room to an unprecedented and constitutionally impermissible extent.

The deterrent effect of the statute is clear. In terms of cost alone the statute's requirement that the newspaper provide "free space" in an equal amount for replies will, in and of itself, deter the publication of critical commentary. Entirely apart from cost considerations, the statute even if not unconstitutionally vague,[3] is susceptible to varying interpretations. The necessity of engaging in lengthy disputation (or, indeed, even in lengthy negotiations with potential repliers) will deter newspapers from opening the door to such difficulties through the publishing of articles critical of governmental candidates. This Court has quite properly recognized the all too human tendency of even the most courageous publishers to "make only statements which 'steer far wider of the unlawful zone.'"[4] This is precisely the type of chilling effect upon freedom of expression which this Court has repeatedly held to be improper.

But even if newspapers choose to risk the costs and difficulties which would result from implementation of

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[3] Appellant has urged that the Florida statute is unconstitutional on due process grounds for vagueness. Amici agree with this agreement and urge that it represents a valid ground in and of itself to strike down the statute.

[4] *New York Times v. Sullivan*, 376 U.S. 254, 279 (1964).

the Florida statute, nevertheless, the result would be one far different than what was envisioned by the framers of the First Amendment. The experience of the Federal Communications Commission, in implementing its "Fairness Doctrine", makes clear that the type of compulsory reply statute at issue here thrusts the government and, in particular, the courts, deeply into the heart of the editorial process. Inevitably, differences of opinion as to the meaning of the general and ambiguous phrases used in the statute will foment litigation. The state courts will be compelled to function (at least in the context of articles concerning candidates for public office) as editors of Florida newspapers. The Florida Supreme Court itself, in its desire to uphold the constitutionality of the statute, was required to interpret and define the meaning thereof in the most torturous fashion. In effect, the Florida Supreme Court began the process of a type of judicial definition of editorial standards which the First Amendment was specifically designed to prevent. Once the task of determining appropriate editorial standards is vested in the courts, or in any other governmental agency, the process of implementing these standards will inevitably decline into a "stop-watch" process where advocates will argue about the fairness of particular words, the propriety of particular lengths of stories, even perhaps the problems of the newspaper distribution process.

The certainty of this process was, we believe, apparent to the gramers of the First Amendment who erected a barrier against this type of governmental regulation by clearly and simply stating that government shall make "no law" abridging freedom of the press. That injunction should be read in the spirit and terms in which it was created and cannot be served by an interpretation which would thrust the government directly into the position of establishing official editorial standards.

The Florida Supreme Court, in upholding the statute, quoted at length this Court's opinion in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1967). However, the Florida Supreme Court pointedly ignored the Court's recognition in *Red Lion* that its decision was compelled by the unique and peculiar circumstances of broadcast media, and should not be given a wider interpretation. The narrowness of exception to First Amendment doctrine carved out by *Red Lion* was made plain by this Court in its later decision in *Columbia Broadcasting System, Inc., supra:*

> "Mr. Justice White's opinion for the Court in Red Lion Broadcasting Co. v. FCC, 395 US 367, 23 L Ed 2d 371, 89 S Ct 1794 (1969), makes clear that the broadcast media pose unique and special problems not present in the traditional free speech case. Unlike other media, broadcasting is subject to an inherent physical limitation. Broadcast frequencies are a scarce resource; they must be portioned out among applicants. All who possess the financial resources and the desire to communicate by television or radio cannot be satisfactorily accommodated."[5]

The holding of *Columbia Broadcasting* emphasizes that the type of compulsory right of reply embodied in the Florida statute would be too much of an imposition of governmental control on editorial judgment even in the case of broadcast media. *A fortiori* it is an impermissible usurpation of editorial freedom in the print media. If the decision of the Florida Supreme Court is upheld, it would mean that the press would be subject to more restrictive

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[5] *Columbia Broadcasting System, Inc.*, 36 L.Ed. 2d at 783.

control than broadcasters, a concept completely at odds with the words and spirit of *Red Lion* and *Columbia Broadcasting System.*

Amici reject the argument that the Florida statute should be upheld on the grounds that it represents a valid exercise of the state's police power in insuring free elections and in allegedly reducing monopoly abuse by the press. This Court has repeatedly pointed out that neither of these grounds can validly support direct imposition of controls on the contents of newspapers.[6] "There is never a paucity of arguments in favor of limiting the freedom of the press."[7] But the claim that the statute would achieve some worthy social goal, despite its admitted limitation of editorial freedom, is one which cannot be accepted by this Court. The Florida compulsory publication statute is no more a legitimate exercise of state police power than it is a constitutionally permissible means to achieve the purposes of the First Amendment.

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[6] See, e.g., *Mills v. Alabama,* 384 U.S. 214 (1966); *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964); *Winters v. New York,* 333 U.S. 507 (1948); *Organization for a Better Austin v. Keefe,* 402 U.S. 415 (1971).

[7] *Columbia Broadcasting System, Inc.,* 36 L.Ed.2d at 801.

CONCLUSION

For the reasons set forth above, amici respectfully requests that this Court reverse the judgment entered by the Supreme Court of Florida, and further declare that the Florida statute is unconstitutional.

Respectfully submitted

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Attorney for Amici, The American Society of Newspaper Editors, and the Society of Professional Journalists, Sigma Delta Chi

February 28, 1974

CERTIFICATE OF SERVICE

I, Leonard H. Marks, hereby certify that I have this 28th day of February, 1974 sent by postage prepaid first class United States airmail two copies of the foregoing Brief of Amici Curiae, The American Society of Newspaper Editors and The Society of Professional Journalists, Sigma Delta Chi in Support of Appellant to:

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APPENDIX

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1920 L Street, N.W.
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February 12, 1974

Daniel P. S. Paul, Esquire
1300 First National Bank Building
Miami, Florida 33131

In re: *The Miami Herald Publishing Company v. Pat L. Tornillo, Jr.*, U.S. Supreme Court No. 73-797

Dear Mr. Paul

Pursuant to Rule 42 of the Rules of the Supreme Court, the American Society of Newspaper Editors and the Society of Professional Journalists, Sigma Delta Chi, hereby request consent of the Miami Herald Publishing Company to the filing of a brief amici curiae by ASNE and the Society of Professional Journalists, Sigma Delta Chi in the above-referenced case.

Your consent would be appreciated.

Sincerely

/s/ Leonard H. Marks

Consented to: /s/ Daniel P. S. Paul
Attorney for Miami Herald
Publishing Company

Law Offices
COHN AND MARKS
1920 L Street. N.W.
Washington, D.C. 20036

February 12, 1974

Tobias Simon, Esquire
1492 South Miami Avenue
Miami, Flroida 33130

In re: *The Miami Herald Publishing Company v. Pat L. Tornillo, Jr.*, U.S. Supreme Court Case No. 73-797

Dear Mr. Simon

Pursuant to Rule 42 of the Rules of the Supreme Court, the American Society of Newspaper Editors and the Society of Professional Journalists, Sigma Delta Chi, hereby request consent of Pat L. Tornillo, Jr. to the filing of a brief amici curiae by the American Society of Newspaper Editors and the Society of Professional Journalists, Sigma Delta Chi, in the above-referenced case.

Your consent would be appreciated.

Sincerely

/s/ Leonard H. Marks

Consented to: /s/ Tobias Simon
Attorney for Pat L. Tornillo, Jr.